

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

WESLEY R. SPRATT

v.

C.A. No. 03-390-T

ASHBEL T. WALL,
STATE OF RHODE ISLAND, et al.

**MEMORANDUM AND ORDER STAYING PETITION
AND DENYING DEFENDANT'S MOTION TO DISMISS
PETITIONER'S APPLICATION FOR A WRIT
OF HABEAS CORPUS**

ERNEST C. TORRES, Chief Judge.

Introduction

Wesley R. Spratt ("Spratt") brought this pro se application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The State of Rhode Island has moved to dismiss for failure to exhaust state remedies.

Spratt's petition contains one exhausted claim and five unexhausted claims and the question presented is whether the petition should be dismissed in whole or in part or stayed to give Spratt an opportunity to exhaust the unexhausted claims. A magistrate judge has recommended that the State's Motion to Dismiss be denied but that Spratt's petition be stayed while Spratt exhausts his state claims. Report & Recommendation at 27 (Martin,

Mag. J.) (January 26, 2004). This Court accepts that recommendation, in part, and modifies it as hereinafter explained.

Background

On February 13, 1997, a jury found Spratt guilty of murder, first degree robbery, carrying a pistol without a license, and committing a crime of violence. Spratt, an habitual offender, was sentenced to life imprisonment for the murder and an additional forty years for the other convictions.

Spratt appealed, claiming that the trial justice erred in allowing an in-court identification to be made by means of an unduly suggestive procedure. On December 21, 1999, the Rhode Island Supreme Court affirmed Spratt's conviction.

On or about November 3, 2000, Spratt filed a "Notice of Post-Conviction Remedy" in the Rhode Island Superior Court. On September 8, 2003, Spratt filed a petition for post-conviction relief that, once again, challenged the identification procedure citing Neil v. Biggers, 409 U.S. 188 (1972). Spratt also asserted five other claims, to wit: (1) that the State withheld material exculpatory evidence, introduced fabricated evidence, and coerced witnesses into providing perjured testimony; (2) that Spratt's counsel was ineffective; (3) that the State was negligent/malicious in its pretrial investigation, specifically in its witness identification procedures; (4) that the evidence relied upon was physically impossible; and (5) that the trial justice abused his

discretion by sentencing Spratt as an habitual offender. The State moved, in Superior Court, to dismiss Spratt's post-conviction relief petition and, on June 1, 2001, counsel was appointed to represent Spratt.

One year later, Spratt, acting pro se, began filing a series of civil suits against individuals involved in his trial as well as against the attorney appointed to represent him in his petition for post-conviction relief. In addition, on September 8, 2003, Spratt filed his § 2254 petition in this Court.

On October 14, 2003, Spratt's state court petition was dismissed. The reasons for dismissal are not clear but it appears that Spratt elected to pursue his § 2254 petition instead.

Discussion

I. STAY-AND-ABEYANCE

In Rose v. Lundy, the Supreme Court held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." 455 U.S. 509, 510 (1982) (emphasis added). The Rose Court observed that the total exhaustion rule would not "serve to 'trap the unwary pro se prisoner'" because "[t]hose prisoners who misunderstand this requirement and submit mixed petitions nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims." Id. at 520.

However, when Rose was decided, there was no statute of

limitations for § 2254 petitions. The Anti-Terrorism and Effective Death Penalty Act (AEDPA), which was enacted after Rose, establishes a 1-year statute of limitations for the filing of federal habeas petitions. See 28 U.S.C. § 2244(d)(1). Consequently, now, a prisoner whose petition is dismissed under the "total exhaustion" rule might be barred from re-filing by the time that he exhausts his claims. As the Supreme Court has stated:

The combined effect of Rose and AEDPA's limitations period is that if a petitioner comes to federal court with a mixed petition toward the end of the limitations period, a dismissal of his mixed petition could result in the loss of all of his claims - including those already exhausted - because the limitations period could expire during the time a petitioner returns to state court to exhaust his unexhausted claims.

Pliler v. Ford, 124 S.Ct. 2441, 2445 (2004).

In order to mitigate this unforeseen consequence of Rose's "total exhaustion" rule, several circuits have adopted a "stay-and-abeyance" procedure for mixed habeas petitions. See Pliler, 124 S.Ct. at 2450 (Breyer, J., dissenting) (citing circuit cases adopting a stay-and-abeyance procedure). The procedure adopted by the Ninth Circuit is illustrative. It involves three steps: (1) dismissal of any unexhausted claims; (2) a stay of the exhausted claims, pending exhaustion of the unexhausted claims; and (3) after the unexhausted claims have been exhausted, amendment of the original petition to add the newly exhausted claims that then relate back to the original petition. See Pliler, 124 S.Ct. at

2445 (citing Calderon v. United States Dist. Court for the Northern Dist. of California ex rel. Taylor, 134 F.3d 981, 988 (9th Cir. 1998)).

It could just as easily be argued that the risk that dismissal of a mixed petition might cause exhausted claims to be time barred would be eliminated by dismissing only the unexhausted claims. See, e.g., Jackson v. Dormire, 180 F.3d 919, 920 (8th Cir. 1999) (holding that petitioner should be given the option to amend the mixed petition and to proceed only with claims that had been exhausted by the time the AEDPA statute of limitations period expired). Nevertheless, the First Circuit, in dicta, appears to have endorsed the use of a "stay-and-abeyance" procedure by stating that the use of stays is "'especially commend[ed]' ... 'in instances in which the original habeas petition, though unexhausted, is timely filed, but there is a realistic danger that a second petition, filed after exhaustion has occurred, will be untimely.'" Nowaczyk v. Warden, N.H. State Prison, 299 F.3d 69, 79 (1st Cir. 2002) (quoting Delaney v. Matesanz, 264 F.3d 7, 13 n.5 (1st Cir. 2001)).

Like all rules, the "stay-and-abeyance" rule may be subject to qualifications and exceptions. For one thing, it is not clear when a "realistic danger" exists that a second petition might be time barred because AEDPA's one year statute of limitations is tolled during the pendency of state post conviction relief proceedings.

See 28 U.S.C. 2244(d)(2).

In addition, a petitioner should not be permitted to use the rule in a manner that defeats the purpose of AEDPA's statute of limitations by unduly delaying the assertion and/or resolution of his claims. The Second Circuit seeks to prevent such abuses by granting a stay of limited duration and conditioning it upon the prisoner promptly exhausting his state court remedies and returning to federal court immediately after exhaustion:

[W]hen a district court, confronted with a mixed petition, elects to stay the petition, it should explicitly condition the stay on the prisoner's pursuing state court remedies within a brief interval, normally 30 days, after the stay is entered and returning to federal court within a similarly brief interval, normally 30 days after state court exhaustion is completed. If either condition of the stay is not met, the stay may later be vacated nunc pro tunc as of the date the stay was entered, and the petition may be dismissed (unless the time the petitioner has taken to initiate exhaustion in the state courts and to return to federal court after exhaustion has not consumed more than the portion of the one-year limitation period that remained when the habeas petition was initially filed).

Zarvela v. Artuz, 254 F.3d 374, 381 (2d Cir. 2001).¹

In this case, it does not appear that Spratt unduly delayed in asserting his claims or that he failed to exercise reasonable diligence in pursuing them in state court. He did pursue his state

¹The purpose of the two 30-days intervals is to "afford some petitioners (those with fewer than 60 days remaining on the limitations period) brief additional time, beyond the normal one-year period, to pursue state court remedies and return to federal court." Zarvela, 254 F.3d at 381-82.

court remedies until his ill-advised decision to focus on his prematurely filed § 2254 petition, instead. Under these circumstances; and, given the absence of any clearly established procedure for dealing with mixed petitions under such circumstances, the appropriate course of action is, as the magistrate judge has recommended, to deny the State's motion to dismiss and stay the case thereby affording Spratt an opportunity to exhaust his unexhausted claims.

In order to ensure that Spratt acts promptly to exhaust his state court remedies, the stay is conditioned upon Spratt initiating such action, within 30 days, and diligently pursuing it to conclusion. The stay is further conditioned upon Spratt returning to this Court, prepared to pursue his § 2254 petition, within 30 days after he has exhausted those remedies. If either condition is not satisfied, the stay will be vacated nunc pro tunc as of the date of this Order and Spratt's § 2254 petition will be subject to dismissal with prejudice.

Ernest C. Torres

Date: , 2005